2004

Advanced Management Concepts, Inc. v. Staffing America, Inc. : Reply Brief

Utah Court of Appeals

Matthew C. Barneck; Richards, Brandt, Miller and Nelson; Attorney for Appellee.
Donald Joseph Purser; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

ADVANCED MANAGEMENT CONCEPTS, INC.	:	
Appellant,	:	
vs.	:	
STAFFING AMERICA, INC.	:	Case No:20040524-CA
Appellee.	:	

APPELLANT'S REPLY BRIEF

Matthew C. Barneck

Richards, Brandt, Miller & Nelson
Key Bank Tower
Seventh Floor
50 South Main Street
Box 2465
Salt Lake City. Utah 84110-2465
Attorney for Appellee

DONALD JOSEPH PURSER #2663

Law Offices of Donald Joseph Purser
2595 East 3300 South
Salt Lake City, UT 84109
Telephone: (801) 532-3555
Facsimile: (801) 493-0111
Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

ADVANCED MANAGEMENT CONCEPTS, INC. Appellant, vs. STAFFING AMERICA, INC. Appellee.	: : : : : : : : : :	Case No:20040524-CA

APPELLANT'S REPLY BRIEF

Matthew C. Barneck

Richards, Brandt, Miller & Nelson
Key Bank Tower
Seventh Floor
50 South Main Street
Box 2465
Salt Lake City, Utah 84110-2465
Attorney for Appellee

DONALD JOSEPH PURSER #2663

Law Offices of Donald Joseph Purser
2595 East 3300 South
Salt Lake City, UT 84109
Telephone: (801) 532-3555
Facsimile: (801) 493-0111
Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities

Argument

1. APPELLANT DID NOT BEAR A FIDUCIARY DUTY TOWARDS APPELLEE.

Appellee's (SAI) brief claims (pg 25, ln 8-15)) that Appellant (AMC) owed a fiduciary duty to SAI due to a agent-principal relationship between the parties, correctly citing Restatement (Second) of Agency for such proposition, but incorrectly claiming that AMC as the agent of SAI. Within the same section in which SAI claims that AMC is its agent, SAI repeatedly refers to its and AMC's "co-employees" (pg 27, ln 3, ln 5, ln 9, ln 11 and ln 17). AMC does not dispute that such persons were co-employees, but does dispute SAI's analysis that AMC "had influence or superiority over SAI because it controlled the process of placing health insurance" (pg 27, ln 12-13).

The consistent and repeated use of the term "co-employees" clearly states that both parties had responsibilities and obligations towards such persons. AMC was responsible for one aspect of the relationship, that is, supplying health insurance. SAI was responsible for the remaining employer obligations. Thus, the parties were in a comparatively equivalent position, both having shared responsibilities, duties and rights with respect to their co-employees. While SAI in gnomic fashion declares that AMC had "influence" or "superiority" (pg 27, ln

12)over SAI regarding the health insurance, there is no recitation of facts supporting such a conclusion. In fact, the parties did have co-employees for which they were equally responsible in all aspects of the relationship. It is admitted that AMC did fail to timely pay certain health insurance premiums, but there is no evidence that AMC had an exclusive *fiduciary duty to SAI* for the payment of such premiums. The fiduciary duty existed towards the individual "co-employees" insuring that health insurance coverage with respect to such "co-employees" was consistent, regular and reliable. In such fiduciary responsibility to the co-employees, AMC was admittedly deficient. But there was no deficiency with respect to SAI, for no fiduciary duty exists between SAI and AMC.

Utah case law is replete with references to fiduciary duties in many categories, but no references exist regarding fiduciary duties for those sharing responsibilities for co-employees. Utah cases on the aspects of fiduciary duty include:

1. Attorney-client fiduciary responsibility: *Coroles v. Sabey*, 79 P.3d 974 (2003); *Bennett v. Jones*, 70 P.3d 17 (2003); *Walter v. Stewart*, 67 P.3d 1042 (2003); *Normon v. Arnold*, 57 P.3d 997 (2002), *Roderick v. Ricks*, 54 P.3d 1119 (2002); *Kilpatrick v. Wiley*, 37 P.3d 1130 (2001); *Timm v. Dewsnup*, 921 P.2d 1381 (1996).

2. Corporate Director duty: *Bingham Consolidation v. Groesbeck* 105 P.3d 365 (2004); *Reedeker v. Salisbury*, 952 P.2d 577 (1998).

3. Insurance agent responsibility: *Black v. Allstate*, 2004 UT 66; *Campbell v. State Farm*, 65 P.3d 1134 (2001).

4. Banker's duty: *FiveF. v. Heritage Savings* 81 P.3d 105 (2003).

5. Spousal duty to one another: *Peirce v. Peirce* 2000 UT 7.

6. Trustee or Personal Representative: *Perrenoud v. Harman*, 8 P.3d 293 (2000); *Oxendine v. Overturf* 973 P.2d 417 (1999); *Matter of Estate of West*, 948 P.2d 351 (1997).

7. Real Estate Broker/Agent: *Smith v. Fairfax Realty*, 82 P.3d 1064 (2003); *Russell/Packard Development v. Carson*, 78 P.3d 616 (2003); *Salt Lake County v. Western Dairyman*, 48 P.3d 910 (2002); *SLW/Utah v. Guardian Title* 970 P.2d 1265 1998);

8. Stockbroker: *Covey v. Covey* 80 P.3d 553 (2003).

9. Religious: *Franco v. Church of Jesus Christ of Latter-day Saints* 21 P.3d 198 (2001)

While the above cases are interesting, they cannot form the basis for SAI's claim that a fiduciary relationship exists between the two co-employers of those

persons whose health insurance premiums were not timely paid. The definition of a fiduciary relationship set out in *First Security v. Banberry,* 786 P.2d 1326 (Utah, 1996) clearly supports the conclusion that AMC was not a fiduciary for SAI:

> A fiduciary relationship imparts a position of peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary.

For instance:

1. AMC did have have a duty to act *primarily* for SAI, but rather for the insureds;

2. AMC was not in a position to have influence over SAI nor did it exercise influence over SAI;

3. AMC clearly was not superior to SAI; and

4. AMC did not have charge over any property, interest or authority of SAI, but rather over the property, interest and authority of the insureds.

Two Utah cases discussing fiduciary duty may be applicable to the case at bar. *Semenov v. Hill*, 982 P.2d 578 (1999) concerns a Russian speaking plaintiff (Semenov) who purchased a restaurant from Hill. At the closing, Semenov

claimed that he was presented with a 20 page document which he could not read under the circumstances and did not have time to read even if he could have understood its contents. However, he did sign the document, but later learned that the document disclosed that the restaurant operated with negative cash flow.

Semanov claims that a fiduciary duty arose at the closing when Hill became angry with Semanov for hesitating in closing the purchase, and that Hill implied that Semanov should trust Hill. Semanov argues that the assertion of trust (similar to the trust which SAI claims AMC created when AMC represented it would pay health insurance premiums) gave rise to a fiduciary duty. Disagreeing, the Utah Supreme Court opined:

> Even assuming that Semenov trusted and relied upon Hill's alleged implied representation, *merely depending on another does not create a fiduciary relationship*. See 17 C.J.S. Contracts sec. 132 (1963) (emphasis added) Id. at 580.

and thereby, the Utah Supreme Court negated the fiduciary duty claim which Semanov argued that the real estate agent owed to him.

In the case at bar, SAI claims no more than that it, similar to Semanov, depended upon the representation by AMC that AMC would timely pay the health insurance premiums. SAI obviously depended on AMC to carry out its representations of timely payment. From that mere dependence, SAI claims a

fiduciary relationship arose, however, application of the principles enunciated above in *Semanov* clearly results in a finding that there is no fiduciary duty created when a party merely depends upon performance by another party.

Another Utah case, *Grynberg v. Questar*, 70 P.3d 1 (Utah 2003) involve a breach of contract dispute for the transportation of crude oil. The case involves an interesting discussion of the economic loss doctrine and its application to breach of contract, stating

> This court . . . offers a clarification: the economic loss doctrine does not bar tort claims when those tort claims are based on a duty independent of those found in the contract. In arguing for common carrier liability and breach of fiduciary duty, the Grynbergs appear to realize the importance of identifying an independent duty. However, even accepting the Grynbergs' allegations as true, there is insufficient evidence in the record to support a finding of common carrier liability or other fiduciary obligations. Id. at 13.

An obligation of fiduciary duty cannot be arbitrarily plucked from the mass of a litigant's pleadings and assertions at trial and given credence merely because of its existence. He asserting a fiduciary duty must establish the foundational points through sufficient and convincing evidence. As in *Grynberg*, supra, SAI is required to find and prove an independent duty apart from the contractual obligations between the parties before that elusive fiduciary duty appears.

SAI clearly established a contractual duty between the parties requiring AMC to pay the insurance premiums on a timely basis. Furthermore, SAI presented claims cognizable as damages in that SAI was required to pay from its own resources health claims not covered by health insurance due to a breach of contract by AMC. And all of such claims clearly fall under the rubric of breach of contract, albeit an oral contract. However, such claims do not give rise, and SAI has failed to prove, that there was a fiduciary duty established between SAI and AMC. Perhaps a fiduciary duty existed between AMC and those for whom the health insurance premiums were to protect, but SAI is one step too many removed from the chain of responsibility sufficient to create a fiduciary duty. SAI was merely dependent on AMC fulfillment of its contractual duties, thus precluding a finding of a fiduciary duty between the two co-employers, and thus further precluding a finding of a breach of fiduciary duty.

As the court determines that no fiduciary duty existed between the parties, the court must therefore determine that AMC owes no attorney's fees to SAI for the only claim of attorney's fees arises as a result of the trial court's erroneous finding that a fiduciary duty existed.

2. AMC PRESERVED ITS DEFENSE TO BREACH OF FIDUCIARY DUTY AT TRIAL.

SAI claims (brief, pg 23, ln 11-13) that AMC failed to preserve the issue of breach of fiduciary duty at trial. SAI correctly cites, but wrongly interprets *Badger v. Brooklyn Canal*, 966 P.2d 844 (Utah, 1998) which states that:

> A trial court has the opportunity to rule if the following three requirements are met: (1) "the issue must be raised in a timely fashion;" (2) "the issue must be specifically raised;" and (3) a party must introduce supporting evidence or relevant legal authority." (citing *Hart v. Salt Lake County Comm'n*, 945 P2d 125, 130 (Utah, Ct App. 1997).

While it is true that AMC did not raise the issue, SAI did raise the issue both at trial and through its supporting trial memoranda. It presented the issue of whether there was a fiduciary duty "in a timely fashion," i.e. before and during the trial; it specifically raised the issue (or otherwise the trial court would not have ruled on the issue) and it introduced relevant legal authority. SAI somehow believes that in order for AMC to contest the issue that AMC needed to have raised the issue, brought up legal authority and argued the matter. Such belief is incorrect, for it is sufficient for one party to raise the issue for a court to be introduced to the question, analyze the matter and then give its ruling. *Spears v. Warr* 44 P.3d 742 (Utah, 2002) states:

> The Warrs claim the issue was adequately preserved simply because the trial court ruled on it. We agree. By ruling on the question, the trial court demonstrated that the issue was brought to its attention, and the issue has been sufficiently preserved for our review. Id at 745.

Therefore, because the trial court did rule on the issue of fiduciary duty, the issue was clearly brought to the attention of the trial court and the "issue has been sufficiently preserved for . . . review." Id.

3. DAMAGES FOR LOSS OF FUTURE PROFITS ARE TOO SPECULATIVE

SAI argues that it established its loss of profits with reasonable certainty, calling upon supposed experts who analyzed SAI's growth patterns in the past, evaluated the loss of clients allegedly lost due to the actions of AMC and extrapolated the loss of clients over the future five years to determine how much in profits were lost by SAI. The expert even went to the step of backing out of the equation for lost profits the cost of generating the profits.

However, regardless of how precise one tries to be in estimating future profits or the loss thereof, the process is but a guess, an estimate, a hunch based on experience. But regardless of the amount of experience any gaggle of experts can summon, future events are unknown, for one cannot consider future changes in the economy, illness, death, changes in regulations or laws, adverse judicial opinions or a host of other factors. Thus, future profits should not be considered as an element of damages.

The Idaho Supreme Court in *Just's v.Arrington Construction,* 583 P.2d 997 (Idaho 1978) analyzes a case in which a main street retail merchant in an Idaho city sued a contractor hired by the city to renovate the downtown area of the city. The contractor failed to complete the project on time, neglected to minimize construction roadblocks and refused to promote normal traffic flow, resulting in substantial economic losses to the merchant.

The merchant sued under several theories, including negligence by the contractor for failure to minimize the economic impact of the reconstruction. The court looked at the duties imposed by the law upon the defendant with respect to the plaintiff's business and the resultant economic losses, not with respect to the written contract between the city and the contractor.

The Court averred, as a general rule, no cause of action accrues against a defendant whose actions prevent plaintiff from obtaining prospective economic advantage and cites Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974); Restatement (Second) of Torts, § 766C(c) (Tent. Draft No. 23, 1977); W. Prosser, supra, § 130; 1 F. Harper & F. James, The Law of Torts, § 6.11 at 513 (1956); James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand.L.Rev. 43 (1972); Note, Negligent Interference With Economic Expectancy: The Case for Recovery, 16 Stan.L.Rev. 664 (1964).

See also D. Dobbs, Handbook on the Law of Remedies § 6.4 at 466 (1973) and then quotes Prosser:

> [61] "Certain types of interests, because of the various difficulties which they present, have been afforded relatively little protection at the hands of the law against negligent invasions. Thus interests of a pecuniary nature, such as the right to have a contract performed, the expectation of financial advantage, or the integrity of the pocketbook which may be damaged by reliance upon a representation, all present special problems . . . In general, however, it may be said that the law gives protection against negligent acts to the interest in security of the person, and all interests in tangible property. In other words, negligence may result in liability for personal injury or property damage." W. Prosser, supra, § 54 at 327.
>
> [63] "The cause of action has run parallel to that for interference with existing contracts. Again the tort began with 'malice', and it has remained very largely a matter of at least intent to interfere. Cases have been quite infrequent in which even the claim has been advanced that the defendant through his negligence has prevented the plaintiff from obtaining a prospective pecuniary advantage; and the usual statement is that there can be no cause of action in such a case. There are, however, a few situations in which recovery has been permitted, all of them apparently to be justified upon the basis of some special relation between the parties. . . . In all probability, as in the case of interference with existing contracts, liability for negligence is not impossible, but it must depend upon the existence of some special reason for finding a duty of care. No case has been found in which intended but purely incidental interference resulting from the pursuit of the defendant's own ends by proper means has been held to be actionable." Id., § 130 at 952.

The Idaho Court adopts the ban against awarding prospective economic losses and explains its decision, in part, as follows:

> [65] Though the rule has been expressed in different ways, the common underlying pragmatic consideration is that a contrary rule, which would allow compensation for losses of economic advantage caused by the defendant's negligence, would impose too heavy and unpredictable a burden on the defendant's conduct
>
> [69] This plaintiff is surely not the only person who may have suffered some pecuniary losses as a result of the downtown renovation project. For example, others who may have suffered pecuniary losses could conceivably include not only all the other businesses in the area, but also their suppliers, creditors, and so forth, ad infinitum. In contrast to the recognized liability for personal injuries and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended. Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio App.1946). If the defendant's liability were extended to all those who suffered any pecuniary loss, its liability could become grossly disproportionate to its fault. Such potential liability would unduly burden any construction in a business area.

Plaintiff urges this court to follow the above reasoning propounded by the Idaho Supreme Court and to disallow any award for prospective loss of future profits.

CONCLUSION

The issue of the existence of a fiduciary duty was preserved for review by this Court due to the fact that the trial court considered and ruled on the matter. However, the trial court erred when it ruled there existed a fiduciary duty between the two co-employers of the affected employees. AMC was not a fiduciary of the funds paid for health insurance premiums to SAI, but a contractual partner, a joint venturer, a co-employer. SAI depended on AMC to make the payments timely and the mere existence of such dependence precludes the finding of a fiduciary duty between the parties.

Therefore, the award of attorneys' fees based upon breach of a fiduciary duty should be overturned.

Finally, the award for prospective profits should be overturned as being too speculative.

Dated this ___ day of May, 2005.

DONALD JOSEPH PURSER

MAILING CERTIFICATE

I certify that I mailed two true and correct copies of the foregoing

Appellant's brief, postage prepaid, to:

Matthew C. Barneck
Brian C. Webber
Richards, Brandt, Miller & Nelson
Key Bank Tower, Seventh Floor
50 South Main
Box 2465
Salt Lake City, Utah 84110-2465

on the 23 day of May, 2005.